

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RECEIVED

OCT 14 1968

URKE,)
Appellant,)
)
ONAL BROTHERHOOD OF BOILER-)
RON SHIPBUILDERS, BLACK-)
ORGERS and HELPERS, and)
6 THEREOF,)
Appellees.)

WM B. LUCK, CLERK

NO. 22486

APPELLANT'S OPENING BRIEF

FILED

OCT 14 1968

WM B. LUCK, CLERK

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JOHN F. BURKE,

-VS-

Appellees.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN F. BURKE,

)

Appellant,

)

NO. 22486

-vs-

)

INTERNATIONAL BROTHERHOOD
OF BOILERMAKERS, etc., et al.,)

APPELLANT'S OPENING BRIEF

Appellees.

)

This is an appeal from a judgment for the defendants entered by the United States District Court for the Northern District of California in a suit in which plaintiff (appellant here) challenged the action of the defendant unions in preventing him from running for office and in expelling him from membership therein, as contrary to the provisions of Subchapter 2 (Bill of Rights of Members of Labor Organizations) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C.A. 401, et seq.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Did the District Court have jurisdiction to review the actions of the defendant unions?

(2) Was plaintiff deprived of the rights of speech and assembly within the unions guaranteed to him by 29 U.S.C.A. 411(a)(1) and (2)?

(3) Was plaintiff denied the safeguards against improper disciplinary action guaranteed to him by 29 U.S.C.A. 411(a)(5)?

STATUTES INVOLVED

Section 101 of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C.A. 411) reads in pertinent part as follows:

"(a)(1) Equal rights. -- Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws." (29 U.S.C.A. 411[a][1])

"(2) Freedom of speech and assembly. -- Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: PROVIDED, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations." (29 U.S.C.A. 411[a][2])

"(5) Safeguards against improper disciplinary action. -- No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded

a full and fair hearing." (29 U.S.C.A. 411[a][5])

"412. Civil action for infringement of rights; jurisdiction. Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located." (29 U.S.C.A. 412)

STATEMENT OF THE CASE

The action was instituted in the court below on April 27, 1966 (CT 1),^{1/} by the filing of a complaint for injunctive relief.

The complaint alleged that in violation of the right guaranteed to him by the aforesaid statutes plaintiff had been wrongfully refused permission to run for union office and prayed for an order directing that he be permitted to run for office. Later, by a supplemental complaint (CT 70), plaintiff raised the question of his expulsion from membership and prayed that he be reinstated therein.^{2/}

An answer was filed to the complaint (CT 7) and responses

1/ The transcript of record consists of the clerk's record on appeal (herein as "CT"), the reporter's transcription of the testimony taken at the trial below (cited herein as "RT").

2/ Plaintiff had been "indefinitely suspended" from membership on January 12, 1966 (CT 13). He had brought suit in the courts of California as a result of which he was ordered reinstated to membership but he was not given the right to run for union office (CT 28-29). It was to vindicate the latter right that he initially filed the suit below. When it was brought to the state court's attention that this federal suit had been filed, the state court judge vacated his order for even the limited relief he had previously granted, and, by the supplemental pleading here, plaintiff raised also the question of his expulsion from membership.

were filed to the orders to show cause (CT 47)^{3/}.

Thereafter extensive discovery proceedings were undertaken on both sides. Indeed, much of the clerk's transcript consists of evidence developed this way. Trial was had at which both oral and documentary testimony was adduced: the reporter's transcript runs to about 1100 pages. After the submission of the matter, a judgment was entered for the defendants (CT 462), and a timely notice of appeal to this Court was filed (CT 521).

STATEMENT OF THE FACTS

John Burke, now in his middle forties, had been a member of the Boilermakers Union since his late teens. During the course of a quarter of a century he became active in the affairs of the union and remained in it throughout, except for a period during and following World War II, when he served in the Merchant Marine and was a member of the Sailors' Union. Beginning in 1950, his activity in San Francisco Local 6 of the Boilermakers' Union increased: he participated in committee work; he was elected as a delegate to various conventions and conferences; he became a union negotiator in collective bargaining meetings with employers; he ran for union office. In 1963 he was appointed Assistant Business Manager of Local 6, a

3/ Another action had also been filed in the District Court by certain members of defendant unions claiming that their rights to nominate and vote for plaintiff herein had been infringed by the action of defendants. That proceeding, however, is not now before this Court.



position which he held until the expulsion which is the subject matter of this action (RT 277-290).

During the years of his activities in the union, plaintiff was one of the leaders of a group of men in the local who were attempting to keep it free from the control and domination of the International, headquartered at Kansas City, and in the last few years this situation led to a substantial degree of hostility between plaintiff and the leaders of the International Union.

In the trial judge's opinion appears what he calls a "vignette" depicting the "considerable friction" between appellant and International Vice-President Precht (CT 413). This includes opposition between appellant and the International on at least these specific issues: whether the books of the local were to remain open or closed; whether a local committee should determine who would get high-paying jobs; whether a credit union could function in the local union hall; whether the local should subscribe to a labor newspaper for its members; and, perhaps most important of all, whether the local should remain independent and autonomous or be placed under a trusteeship to be administered by Precht.

4 / Technically the recommendation of the union trial panel was that Burke be "suspended from membership in the International Brotherhood and from all rights and privileges pertaining thereto" (CT 269). As the International President observed when forwarding this recommendation to the Executive Council with his "full accord", this was "in effect expulsion of John J. Burke from the International Brotherhood" (EX. H; CT 475).

1 The trial judge implicitly acknowledged that these matters
2 were not unimportant in determining whether, in the ensuing union
3 proceedings, Burke received the protections, both substantive and
4 procedural, to which he was entitled under the provisions of the
5 federal statute, but he erroneously concluded that no persons
6 other than Precht were involved, or that the trial panel or
7 Executive Council took these matters into account.

8 The evidence, however, shows that Berg, the International
9 President, was well aware of Burke's opposition to the Inter-
0 national's and Berg's position on most of these issues; and that
1 Burke was an outspoken opponent of the International's trustee-
2 ship scheme. All minutes of the local -- which contain the
3 record of Burke's activities -- were sent to the International.
4 Berg was present at an informal meeting prior to the formal
5 hearing against Burke at which Precht stated that the real basis
6 for the proceeding against Burke was not the ostensible basis
7 of the charges against him (his brief removal of the contracts),
8 but was "an accumulation of events that had transpired involving
9 Brother Burke as a representative of Local 6" (Ex. 21, page 93).
0 Berg, the chief executive officer of the International, further-
1 more told each member of the Executive Council, the final judges
2 in this case, that he was "in full accord" with the recommenda-
3 tion to expel plaintiff (Ex. H; CT 475), and that any vote
4 other than a yes or no -- i.e., a vote to mitigate the penalty
5 or grant leniency -- "will have to be fully explained" (ibid).
6 It is not surprising therefore that the Executive Council voted

to expel Burke.

The immediate background leading to Burke's expulsion was this. In June and July of 1965 negotiations took place between the employers of shipbuilders and ship repairmen, and the Pacific Coast Metal Trades Council, an organization consisting of the concerned craft unions, one of which was Local 6 of the Boilermakers Union.

In prior years each constituent local, irrespective of the number of men affected, had one vote. So that a local of 100 members or less cast a vote equal to that of a local like Number 6, which had almost 2,500 members (CT 150-151; RT 206, 979). In 1963, to remedy this situation, new rules were adopted to permit a "one man one vote" referendum (CT 150-151; RT 110, 207; Ex. 3, pp. 21-23). The proposed 1965 agreement, therefore, was to be submitted to the men, not their locals, for their acceptance or rejection.

After various of the affiliated locals reported acceptance, rumors of substantial irregularities in the voting procedures employed by some of the locals came to the attention of Burke and other representatives of Local 6 -- which had voted not to accept the proposed contract. Burke was instructed by his superior, Edgar Rainbow, the Business Manager of Local 6, to investigate these rumors. Substantiation was found and protests were lodged both by Rainbow and by Burke with the appropriate officers of the Metal Trades Council as well as with the officers of the AFL-CIO and the Boilermakers International. All

of this, of course, came to the attention of the International and President Berg. No responses were ever forthcoming from the Metal Trades Council or the AFL-CIO.

Burke and Rainbow and Local 6 retained counsel to advise them on these matters; a legal analysis was made, submitted to the local, and by it forwarded to the Boilermakers International Union, which, after the events at bar but not before, ordered Local 6 to cease and desist from further pursuing the matter. Burke immediately obeyed this order.

In the meantime, however, faced with the prospect of there being put into effect a three-year contract covering thousands of men, and in the face of evidence that the contract had never been properly ratified, and having had no response from any source concerning the claims of fraudulent reporting of referendum returns, Burke, acting in what he believed to be the best interests of the men he had been elected to represent, went to the office of the printer of the contracts and removed them for a period of about twenty-four hours. The court below found

"John Burke felt, at the time of the taking of the contracts, that by acquiring possession and possibly delaying or interfering with the final signing of the agreement that he could precipitate a fruitful investigation of the rumored irregularities. He thought he was acting in the interests of the membership of Local 6." (CT 463)

Burke returned the contracts the next day. Neither his immediate superior, Rainbow of Local 6, nor any other Local 6 representative or member, nor Thomas Rotell of the Metal Trades

Council, the individual most directly concerned with the contracts, nor anyone else locally saw fit to pursue the matter further. But International Vice-President Precht of Denver, Colorado, ^{5/} filed charges against Burke. Precht specifically requested that those charges be heard by the International Union rather than by Local 6 (Ex. 21, p. 8). International President Berg promptly complied and had the International, rather than the local, assume jurisdiction (ibid 3), although he did not state what were the circumstances that warranted this departure from local autonomy in this case (CT 67 [International Constitution, Art. XVII, Section 3(b), p. 73]), and although Local 6 was fully equipped and competent to handle the matter itself (RT 158-159).

The Constitution provided that before a formal trial took place there should be an informal conference to give the parties an opportunity to resolve the matter (CT 67 [International Constitution, Art. XVII, Section 2(b), p. 72]). The trial body appointed by the International President, consisting of two of Precht's co-International Vice-Presidents, apparently realizing that Precht was not about to let Burke "off the hook", set the trial for the very day after the International President had scheduled the informal conference.

5/ Precht not only recommended, over Burke's opposition, that he (Precht) be made a trustee over Local 6, but Precht's own history in the Boilermakers' Union shows that his principal function is interfering with the autonomous operation of locals throughout the country -- e.g., Denver, Colorado (RT 860); Chicago, Illinois (RT 865); Philadelphia, Pennsylvania and Groton, Connecticut (RT 865-866).

1 Even though Burke attempted to explain why he had tem-
2 porarily taken the contracts, Precht was not to be dissuaded
3 from pressing forward, because, as he stated, in the presence
4 of International President Berg, the charges "were an accumula-
5 tion of events that had transpired involving Brother Burke".

6 Burke's objection to the International's assumption of
7 jurisdiction (Ex. 21, pp. 9-11), was overruled, not by the trial
8 panel, but by the International President (ibid 12). The
9 trial panel acknowledged that it could not "handle" any appeal
0 from the International President's decision on jurisdiction
1 (ibid 12) -- so much for the independence of the trial panel
2 which recommended Burke's suspension!

3 At the hearing the trial panel heard that Burke had taken
4 the contracts -- which he did not (and does not now) dispute.
5 It also heard him and others explain why. In its recommendation
6 of expulsion, it recognized that Burke was "motivated by a de-
7 sire to bring about an investigation and correction in the
8 procedure", but said that this was not "acceptable" to it (CT
9 269). It said that, whether or not Burke was "motivated by a
0 desire to best represent the membership of Local Lodge No. 6",
1 was not the question before it. It therefore recommended ex-
2 pulsion; its recommendation went to all the other Vice-
3 Presidents ^{6/} -- colleagues of Precht -- with the "full"

4
5 6/ One Vice-President, Stender, who had participated in the
6 negotiations for the contracts, disqualified himself and
Precht, as the charging party, obviously was disqualified. Sev-
eral of the Vice-Presidents were in financial debt to the

concurrence of the International President and with an admonition that a vote in mitigation would have to be fully explained. Burke was expelled. This litigation follows.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION OF THE ACTION

We think there is no dispute between the parties that the district court was correct (CT 466-468) in asserting jurisdiction here. The Bill of Rights of Members of Labor Organizations (29 U.S.C.A. 401, et seq., supra, p. 2) specifically invests a district court with jurisdiction to remedy deprivations of the rights it guarantees. Boilermakers Union v. Rafferty, 348 F.2d 307 (CA 9;1965); Machinists Union v. King, 335 F. 2d 340 (CA 9;1964), cert. den. 379 U.S. 920 (1964); Salzhandler v. Caputo, 316 F. 2d 445 (CA 2;1963), cert. den. 375 U.S. 946 (1963).

Since the district court found with appellant on this point and since we do not understand appellees to contest the jurisdiction of the district court, we shall say no more about the matter at this time.

6 (continued) / International. So much for the independence of the Executive Council which ratified Burke's expulsion with knowledge that the President was in "full accord" therewith and that a vote for a lesser penalty would have to be "fully explained".

II. THE EXPULSION OF APPELLANT FROM APPELLEE UNIONS WAS
CONTRARY TO THE PROVISIONS OF 29 U.S.C.A. 411(a)(1) AND (2)

29 U.S.C.A. 411(a)(1) and (2) provide in substance that a member of a labor organization shall have the right democratically to participate in the life of the union and shall suffer no discipline as a result thereof. This is true whether he is disciplined in his status as a "member" (Salzhandler v. Caputo, supra, or in his status as an "officer" (Machinists Union v. King, supra).

The record, summarized above, is clear that appellant was punished as the result of "an accumulation of events" which brought him into the bad graces of the International. Those events we have recited above; they add up to the fact that appellant was, on a variety of issues, in opposition to the International and was struggling for the autonomy of Local 6 and for the democratic rights of its members.

The district court acknowledged (CT 474) that "[h]ad the panel considered Burke's prior record of opposition", appellant would be able to assert that such action "deters a union member's right to free speech as granted by Section 411(a)(2)". But it concluded, erroneously we submit, that neither the panel nor the Executive Council "was aware of it or took it into account" (CT 473-474).

With respect, we submit that this is reading the record with blinders on. For example, the very record made before the trial panel (Exhibit 21) is replete with evidence that Burke

was acting, throughout, contrary to the position of the International and it shows that it was this "accumulation of events" that led to the charges. Furthermore, the acquiescence by the International President in the suggestion of Precht that the International take jurisdiction away from the local, the International's President's notification to Precht's co-Vice-Presidents that he was in "full accord" with the recommendations of the trial panel, his requirement that a vote in mitigation be fully explained -- all demonstrate that the International hierarchy (of which the Executive Council was an integral part) was not some Olympian Jove sitting in objective judgment on Burke, but was a party with a vital interest in the outcome of the proceedings.

Concerning the International's prior knowledge of Burke's consistent opposition to its policies, it is necessary to recall that since at least 1963, when Precht began to "supervise" the affairs of Local 6 -- if not earlier -- all minutes of the local, which included motions made, and positions taken, by Burke in opposition to positions advanced by the International, were forwarded to the International, and, one may fairly infer, were therefore known to the International hierarchy. Burke's support of Cummings in the latter's effort to unseat International Vice-President Precht at the 1965 Convention of the International was not unknown to the International President or the International Vice-Presidents who made up the Executive Council which passed judgment upon Burke. The actions of

such a "tribunal" need to be scrutinized with the greatest of
7/
care.

Nor should the district judge have ignored the fact that the Local 6 official, Rainbow, and the Metal Trades Council official, Rotell, most directly involved with the contracts, did not deem the incident sufficiently significant to merit the filing of charges -- considering the brief period the contracts were out of the possession of the printer and the unselfish motivation of Burke in taking them. It is clear that the International seized upon the incident as an opportunity to settle scores with Burke for his consistent opposition to its policies of subjugating Local 6 to its will. Such a reading of the record is the only one that will "wash". The implied findings of the district court to the contrary are "clearly" erroneous" (F.R.C.P. 52[a]), and should not be sustained by this Court. United States v. Gypsum Co., 333 U.S. 364, 395 (1945); United States v. Ramos, ___ F. 2d ___, (9 Cir., April 10, 1968; rehearing denied July 25, 1968, No. 21824 slip opinion P. __).

The law on the subject is clear.

7/ "But the union is not a political unit to whose dis-interested tribunals [a member] can look for an impartial review of his 'crime'. . . The Trial Board in the instant case consisted of union officials not judges." Salzhandler v. Caputo, 316 F. 2d 445, 450 (2 Cir., 1963), cert. den. 375 U.S. 946 (1963).

"The [Labor Management Reporting and Disclosure] Act of 1959 was designed to protect the rights of union members to discuss freely and criticize the management of their unions and the conduct of their officers. The legislative history and the extensive hearings which preceded the enactment of the statute abundantly evidence the intention of the Congress to prevent union officials from using their disciplinary powers to silence criticism and punish those who dare to question and complain." (Salzhandler v. Caputo, supra, 316 F. 2d at 448)

Salzhandler v. Caputo, supra, was cited with approval and followed by this Court in Boilermakers v. Rafferty, 348 F. 2d 307, 311-312(9 Cir., 1965).

III. THE EXPULSION OF APPELLANT FROM APPELLEE UNIONS WAS CONTRARY TO THE PROVISIONS OF 29 U.S.C.A. 411(a)(5)

29 U.S.C.A. 411(a)(5) provides that no member of a labor organization may be suspended, expelled or otherwise disciplined unless he has been afforded a full and fair hearing, and that any provision of a union's constitution or by-laws to the contrary shall be of no force and effect.

A full and fair hearing means a hearing which comports with minimal standards of due process and at the very least means a hearing by an unbiased and disinterested tribunal. Carroll v. Local 802, 235 F. Supp. 16, (SD, NY; 1963). See Summers, LEGAL LIMITATIONS ON UNION DISCIPLINE, 64 Harvard Law Review 1049, at 1082:

"The organizational structure of unions is wholly lacking in anything equivalent to an independent judiciary. On the contrary, the discipline procedure tends strongly to be dominated by the officers and groups in power. This creates the greatest single

danger in the area of union discipline -- the frequent lack of a completely unbiased tribunal. The courts have shown some awareness of this and have given protection against any discoverable taint of bias.

Bias may take the flagrant forms of judging the case before it is heard, or deliberately using discipline as a device to eliminate disliked members. . . Bias may also take the less obvious form of combining the prosecuting and judicial functions . . . " (underlining supplied).

A full and fair hearing means that the charges on which the discipline is ostensibly based were not merely a pretext to get rid of a union member because he was a critic of the union's officers and their policies. Leonard v. M.I.T. Employees' Union 225 F. Supp. 937 (D.,Mass; 1964).

Here the record clearly shows that the Executive Council -- co-Vice-Presidents of the accuser Precht -- was, under the direction of International President Berg, compelled to vote against appellant and, except on the condition of "fully" explaining his vote, no member of the Executive Council was free to vote for any penalty short of expulsion. The record further shows that the charges upon which the disability meted out to appellant were ostensibly based, were indeed a pretext and that it was the accumulation of other events -- appellant's long-standing criticism of the union's officers and their policies -- upon which the discipline was in fact imposed.

Finally, even as to those charges, the district court was compelled to find that the most serious of them -- "conduct contrary to and detrimental to the welfare or best interests of

the International Brotherhood or a subordinate body" -- "is not supported by the evidence" (CT 492). Of this charge, the Court said:

" . . . The record is absolutely barren of one shred of evidence of the consequences or repercussions of Burke's conduct which can be said to be detrimental to the best interests of the International or Local 6" (ibid).8/

Since the Executive Council's extreme penalty of expulsion was based upon the charges in toto, it would seem that this finding by the district court should, at the very least, require the matter to be sent back for reassessment of the penalty without consideration of this serious, but untrue, charge. Under the circumstances of this case, it is submitted that it is unreasonable to permit to stand the most serious sanction possible when the record shows that the most serious charge made was not proven.

"Nevertheless, where a particular sanction is clearly permitted by the constitution of a union, the courts should be slow in substituting their judgment for that of the responsible union officials in determining whether or not it is too severe. Where, however, the imposition of a particular sanction is clearly unreasonable under all the circumstances and unjust to individual members of the offending union, the courts should not hesitate to exercise whatever jurisdiction they may have to correct the injustice." (Parks v. International Brotherhood of Electrical Workers, 203 F. Supp. 288, at 311) (underlining supplied).

8 / This finding accords with the International's admission in answers to interrogatories that it had no knowledge that Burke's actions interfered with the International's performance of its obligations (CT 253).



"The factor that the extreme penalty was meted out to the plaintiff, adds weight to the suggestion the plaintiff was punished for his opposition to the regime rather than for slandering the union -- that the alleged slander was the excuse and not the reason for the expulsion." (Reilly v. Hogan, 32 NYS 2d 864, aff'd 36 NYS 2d 423; leave to appeal denied, 37 NYS 2d 426).

CONCLUSION

The foregoing has established (1) that the court below had jurisdiction of the action; (2) that the appellant was deprived of substantive rights guaranteed to him by 29 U.S.C.A. 411(a) (1) and (2); (3) that appellant was deprived of procedural rights guaranteed to him by 29 U.S.C.A. 411(a)(5).

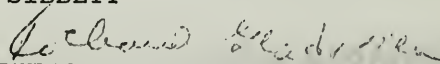
For the foregoing reasons, the judgment below should be reversed.

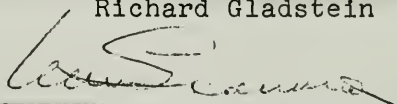
DATED: October 14, 1968.

Respectfully submitted,

GLADSTEIN, ANDERSEN, LEONARD
& SIBBETT

By,


Richard Gladstein

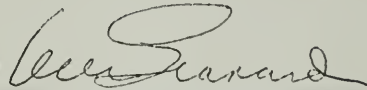

Norman Leonard

CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing
APPELLANT'S OPENING BRIEF was this date mailed to the following

CHARLES P. SCULLY, ESQ.
995 Market Street
San Francisco, California 94103

DATED: October 14, 1968.

A handwritten signature in cursive script, appearing to read "Norman Leonard", written in dark ink.

Norman Leonard

